



fact, as well as the fact that according to Cargill, Inc.'s representation that it was involved in poultry production practices in the IRW until very recently when it restructured and the fact that Cargill, Inc. sets environmental policy on a company-wide basis,<sup>2</sup> Cargill, Inc. should be estopped from arguing that it is not an appropriate defendant to the Preliminary Injunction Motion.

## **II. No bond is required**

Whether to require a bond when entering a preliminary injunction under 42 U.S.C. § 6972(a)(1)(B), a public health statute,<sup>3</sup> is discretionary. The issue of bonding in connection with a claim asserted under 42 U.S.C. § 6972(a)(1)(B) is addressed in 42 U.S.C. § 6972(e). 42 U.S.C. § 6972(e) states: "[t]he court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure." (Emphasis added.) The term "may" as opposed to the term "shall" in 42 U.S.C. § 6972(e) conveys the concept of discretion. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 706 (1983) (interpreting IRS code provision and noting that although not invariable, "[t]he word 'may,' when used in a statute, usually implies some degree of discretion").

Underscoring the discretionary nature of whether to require a bond is Tenth Circuit law interpreting Fed. R. Civ. P. 65(c). As explained by the Tenth Circuit in *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003), "we have previously held that a trial court has 'wide discretion' under Rule 65(c) in determining whether to require security."

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<sup>2</sup> In a document entitled "Citizenship Report: Total Impact" found on Cargill, Inc.'s website [www.cargill.com](http://www.cargill.com), Cargill, Inc. states: "Cargill believes in continuous improvement to protect the environment. . . . We maintain one set of expectations for every part of Cargill, every country and each of our facilities." *See* DKT #1120 (Ex. H, p. 6 (emphasis added)).

<sup>3</sup> RCRA is plainly related to public health. 42 U.S.C. § 6902(a) of RCRA specifically states: "The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources . . . ."

(Citation omitted.) One circumstance where the exercise of this discretion is particularly appropriate is where the injunction being sought, as is the case here, is in the public interest. *See, e.g., Pharmaceutical Society of the State of New York v. New York State Department of Social Services*, 50 F.3d 1168, 1174-75 (2nd Cir. 1995) (recognizing exception to bond requirement for cases involving enforcement of public interests arising out of comprehensive federal health and welfare statutes and upholding waiver of bond requirement in case involving the Medicaid system); *Temple University v. White*, 941 F.2d 201, 220 (3rd Cir. 1991) (finding that district court should consider impact that bond requirement would have on enforcement of important federal rights or public interests arising out of comprehensive federal health and welfare statutes); *Laforest v. Honeywell International, Inc.*, 2003 WL 23180220, \*3 (W.D.N.Y. Sept. 19, 2003) ("Plaintiffs shall not be required to post bond given the important public interest being served by issuance of this injunction and the significant burden obtaining injunctive relief placed upon plaintiffs should a bond be required"); *State of Washington v. Texaco Refining and Marketing, Inc.*, 1991 WL 47081, \*3 (W.D. Wash. Jan. 11, 1991) ("In other analogous cases, federal district courts have exhibited a continuing willingness to fashion equitable remedies for public relief with little or no security").

Whether to require a bond where a preliminary injunction is being sought pursuant to 42 U.S.C. § 6972 of RCRA was addressed in *Greenpeace, Inc. v. Waste Technologies Industries*, 1993 WL 128732, \*3-4 (N.D. Ohio Jan. 21, 1993). In that case, the court applied the public interest exception to the bonding requirement and did not require a bond. The *Greenpeace* court explained:

In addition, some Federal Circuits have carved out a "public interest" or "public policy" exception to Fed. R. Civ. P. 65(c). . . . In the present case, Greenpeace and the citizen plaintiffs are acting as private attorneys general to protect the environment and public health. To require Greenpeace and the citizen plaintiffs

to post a security bond in this case would "effectively deny access to judicial review," and would run counter to the goals of the citizens' suit provision of RCRA. Therefore, this Court, in exercising its discretion, dispenses with the bond requirement.

*Id.* The logic of the *Greenpeace* court is equally applicable to the instant action. This Court should exercise its discretion under the public interest exception and not require a bond.

Moreover, even assuming *arguendo* that it were appropriate to require a bond, the amount of any such bond should be minimal. As explained by the Tenth Circuit, "where a party is seeking to vindicate the public interest," it appears that courts may reduce the size of the bond required." *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) (NEPA case); *Sierra Club v. Norton*, 207 F.Supp.2d 1342, 1343 (S.D. Ala. 2002) (determining that "nominal bond [of \$1000] is appropriate in this instance on the grounds that the injunction to enforce the requirements of a federal environmental statute is in the public interest, and on the further grounds that requiring plaintiffs Sierra Club and Friends of the Earth, Inc. to post bond in an amount sufficient to cover the potential losses to intervenors would effectively bar plaintiffs -- two non-profit public interest organizations -- from obtaining meaningful judicial review or appropriate relief"). In sum, as the preliminary injunction being sought by the State is plainly in the public interest, no bond should be required. Alternatively, should this Court require a bond, it should be *de minimis*.<sup>4</sup>

### III. Conclusion

WHEREFORE, premises considered, the State's Motion for Preliminary Injunction [DKT #1373] should be granted.

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<sup>4</sup> Fed. R. Civ. P. 65(c) is, by its express language, limited to "an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." (Emphasis added.) Defendants are the parties the State is seeking to enjoin and, thus, to the extent the Court were to require a *de minimis* bond it cannot consider purported costs or damages of third persons (or, to use Cargill's term "non-parties"). Tellingly, Defendants have provided no evidence pertaining to any purported costs or damages that the sought-after injunction might cause them to suffer. *See, e.g.,* Rausser / Dicks Decl., ¶ 28.

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